

2002

The State of Utah, Plaintiff/Appellee, v. Anthony James Valdez, Defendant/Appellant : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
ANTHONY JAMES VALDEZ, : Case No. 20020892-CA
Defendant/Appellant. :

BRIEF OF APPELLANT

This is an appeal from a conviction for forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (1999), in the Third Judicial District Court, State of Utah, the Honorable Dennis M. Fuchs, Judge, presiding.

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NATURE OF THE PROCEEDINGS AND JURISDICTION

This is an appeal from a conviction for forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (1999), in the Third Judicial District Court, State of Utah, the Honorable Dennis M. Fuchs, Judge, presiding.¹

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (Supp. 2002).

**STATEMENT OF THE ISSUE, STANDARD OF REVIEW, AND
PRESERVATION OF THE ARGUMENT**

Issue: Under the Fourteenth Amendment, as interpreted by the Shondel jurisprudence, if two statutes proscribe the same conduct but impose different penalties, a criminal defendant is entitled to the lesser penalty. Currently, the Utah forgery and identity fraud

¹ A copy of the Minutes of the “Sentence, Judgment, Commitment” is attached in Addendum A.

statutes proscribe the same conduct, but the identity fraud statute imposes the lesser penalty. Did the trial court err in failing to impose the identity fraud penalty?

Standard of Review: This Court’s “review under the Shondel rule focuses on the trial court’s legal conclusions, which we review under a correction-of-error standard, according no particular deference to the trial court’s ruling.”²

Preservation: This issue was preserved at R. 64 [94-96].

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional provision is relevant on appeal:

The Fourteenth Amendment of the United States Constitution, which provides, in pertinent part:

No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend XIV, § 1.

The following statutes are determinative on appeal:

Section 76-6-501 of the Utah Code, “Forgery,” which is provided in Addendum B.

Section 76-6-1102 of the Utah Code, “Identity Fraud Crime,” which is provided in Addendum C.

² State v. Fisher, 972 P.2d 90, 98 (Utah Ct. App. 1998) (citations omitted). See also State v. Kent, 945 P.2d 145, 146 (Utah Ct. App. 1997).

STATEMENT OF THE CASE

On February 6, 2002 Appellant Anthony James Valdez was charged by information with forgery. R. 2-4. A preliminary hearing was held, and Mr. Valdez was scheduled for arraignment. R. 18-19. At the arraignment, Mr. Valdez pled not guilty. R. 20. Then, a jury trial was held. R. 64.

After the evidence was presented, the defense counsel objected to the way that this case was charged. R. 64 [94]. He explained that this case is more properly charged as identity fraud rather than forgery. Id. at 96. This is because the two statutes are nearly identical, and they cover the same conduct. Id. Further, the identity fraud statute was more recently passed, implying that it should take precedence over the forgery statute. Id. at 95. In these circumstances, Mr. Valdez is entitled to be charged under the identity fraud statute, which imposes a more lenient sentence than the forgery statute. Id. at 96.

The trial court denied the motion, opining that the crimes are distinguishable. Id. The trial court said that forgery involves the utterance of a writing, but identity fraud does not:

[T]here's testimony that Mr. Valdez is the individual that wrote the check and received the goods and services, and I think the difference between identity fraud and forgery is the writing part of it. Identity fraud does not include the utterance of a writing, and in this particular incident we have the uttering of a writing.

Id. So, the court ruled, Mr. Valdez was properly charged with forgery. However, the court stated, it would give the jury a "lesser included instruction" on identification fraud and allow the jury to decide the issue. Id. at 97. This instruction was given along with the

forgery instruction. R. 64 [105-09].

Mr. Valdez was convicted of forgery. R. 37. He filed a timely notice of appeal. R. 50-51.

STATEMENT OF THE FACTS

Around noon on October 29, 2001, Amber Hamlin drove her 1988 Baretta to the Master Muffler & Brake in Kearns for repairs on the exhaust system and replacement of the catalytic converter. R. 64 [21-23]. She left the Baretta at the shop while the work was completed. Id. at 23. Later that day she returned to pick up the Baretta. Id. at 24. Two men accompanied her, and they went into the shop's office to pay for the work while Ms. Hamlin talked with the mechanic, Jeremy Jeffs, who she knew from junior high school. Id. at 22, 33-36.

Inside the shop's office, one of the men explained to the manager, Dennis Hogge, that he owed Ms. Hamlin money and was paying for the work on the Baretta. Id. at 36. He presented Mr. Hogge with a check for \$278.71, which was the correct amount of the bill.³ The check was drawn on the account of James Batley. State's Ex. 1. Mr. Hogge asked for a driver's license, and one was presented. R. 64 [36]. Mr. Hogge copied the number and expiration date on the check. Id. He did not look closely at the license, however, and it was later discovered that the license belonged to someone named Tammy

³ Id. at 34; State's Ex. 1. The check was already filled out and signed when it was presented to Mr. Hogge. R. 64 [36].

Kay Searcy. Id. at 38; State's Ex. 4. Then Mr. Hogge explained that someone needed to sign a catalytic converter replacement form, which is required by the EPA whenever a catalytic converter is replaced in a vehicle. R. 64 [38-39]. The same man who gave Mr. Hogge the check signed the form. Id. at 50-51. Then the men left. Mr. Jeffs testified that one of these men was Mr. Valdez, and that he left with Ms. Hamlin.⁴

About ten days later the check was returned to the shop. Id. at 41. It was marked "LOST/STOLEN." State's Ex. 1. Soon, it was discovered that the person who had issued the check was not James Batley, and that the check was among some checks stolen from Mr. Batley earlier that month. R. 64 [55-56, 58]. Mr. Batley had not signed any of the checks before they were stolen and had not given anyone permission to sign his name to the checks. Id. at 58. He also testified that the signature on the check was not his, and that he has never patronized Master Muffler & Brake. Id. at 58-59.

Dalton Campbell, a deputy sheriff with the Salt Lake County Sheriff's Office, came to the shop to investigate the matter. Id. at 63-64. He took the check and catalytic converter form into custody and asked Mr. Hogge for a description of the man who had issued the check. Id. at 64-65. Mr. Hogge testified that both of the men who went into shop's office were similar in age and body build. Id. at 35, 49. In fact, there was very little to distinguish them other than a slight difference in their heights. Id. at 27, 35, 49. Accordingly, Mr. Hogge was not able to identify Mr. Valdez as the perpetrator from a

⁴ Id. at 24-25. Although Mr. Jeffs identified Mr. Valdez as the man who left with Ms. Hamlin, Mr. Jeffs was under a car working when Ms. Hamlin spoke with him, and he never got a good look at either of the men who were with her. Id. at 25-26, 28-29.

photo line-up presented by Officer Campbell.⁵ Additionally, no identifiable fingerprints were left on the check. Id. at 91. However, a fingerprint analyzer at trial testified that one fingerprint on the catalytic converter form belonged to Mr. Valdez. Id. at 85-86.

Mr. Valdez was arrested and charged with the crime. R. 1-4.

SUMMARY OF THE ARGUMENTS

Under the Equal Protection clause of the federal constitution, as interpreted by the Shondel jurisprudence, Mr. Valdez should have been sentenced under the identity fraud statute, not the forgery statute. This is because these two crimes are indistinguishable. Where crimes are indistinguishable, the Equal Protection clause requires the imposition of the more lenient sentence. State v. Shondel, 453 P.2d 146, 148 (Utah 1969). And in this case, that sentence is the identity fraud sentence.

The argument below focuses primarily on showing that the crimes of identity fraud and forgery are the same. Each crime has five basic elements, and these elements are the same in practice and by definition. This argument will show, first of all, that the action elements of the crimes are indistinguishable. Although they are phrased differently, they are both broad and both cover those acts of deception involving the use of someone else's name or other personal information.

Second, this argument will show that the second elements of the crimes are the

⁵ Id. at 75. At trial, Mr. Hogge tentatively identified Mr. Valdez as the person who handed him the check, but said that he was not "absolutely positive" about the identification. Id. at 35.

same. The second elements involve the actual information used by a perpetrator. For both statutes, this information ranges from names to electronic storage data.⁶ There is no information covered by one statute that is not included in the other, and so there is no distinction between the statutes on that basis.

The third elements of the crimes are identical on their face. Under both statutes, the perpetrator must have acted without authorization from the person whose information is used.⁷ Fourth, both statutes involve the same mental intent. That is, both statutes require, at a minimum, a showing that the perpetrator acted knowingly.⁸ Finally, the fifth elements both involve acting with fraudulent intent. As with the other elements, there is nothing about the fifth elements that distinguishes the crimes.

In sum, identity fraud and forgery are the same. Because of this, the Equal Protection clause applies to give Mr. Valdez the lesser penalty of the identity fraud statute. Instead, he received the greater penalty of the forgery statute. So, his sentence should be vacated and this case remanded for re-sentencing.

⁶ Utah Code Ann. § 76-6-1102(1) (Supp. 2002); Utah Code Ann. § 76-6-501(1) & (2) (1999).

⁷ Utah Code Ann. § 76-6-1102(2)(a) (Supp. 2002); Utah Code Ann. § 76-6-501(1) (1999).

⁸ Utah Code Ann. § 76-6-1102(2) (Supp. 2002); Utah Code Ann. § 76-6-501(1) (1999).

ARGUMENT

MR. VALDEZ'S FORGERY SENTENCE SHOULD BE VACATED AND HE SHOULD BE RE-SENTENCED UNDER THE MORE LENIENT IDENTITY FRAUD STATUTE

Mr. Valdez should have been sentenced for a class B misdemeanor under the identity fraud statute, rather than a third-degree felony under the forgery statute. This is because the identity fraud statute is nearly identical to the forgery statute, and the evidence from trial supports a conviction under either statute.⁹ In such circumstances the

⁹ A finding of identity fraud is presumable because this crime was framed as a "lesser included offense" in the jury instructions and on the verdict sheet. R. 37, 64 [107]. Accordingly, the jury could not have convicted Mr. Valdez on what was termed the "principal" crime of forgery without also finding the elements of identity fraud. R. 64 [107]. And so, because Mr. Valdez was convicted of forgery, R. 37, the elements of identity fraud were necessarily found.

This is shown by a review of the jury instructions. The jury instructions for forgery were as follows:

One, that the defendant, Anthony James Valdez; two, intentionally or knowingly made, completed, executed, authenticated, issued, transferred, published or uttered a writing; and two, that said writing or utterance purported to be the act of James C. Batley; and three, the said writing or utterance was not the act of James C. Batley or authorized by him; and four, that the defendant knew the writing or utterance was not the act of James C. Batley and was not authorized by him; and five, that the defendant knew the writing or utterance was not the act of James C. Batley and was not authorized by him; and five, that the defendant had a purpose to defraud anyone or had knowledge that he was facilitating a fraud to be perpetuated by anyone.

R. 64 [105]. The instructions for identity fraud do not contain anything not embodied in the forgery instructions above, with the exception of the instruction that the value of the goods taken must be less than \$300. However, that instruction is necessary because identity fraud is classed according to the value taken, not because a different or extra element is involved. Utah Code Ann. § 76-6-1102(3) (Supp. 2002). The identity fraud instructions are:

One, that the defendant, Anthony James Valdez; two, knowingly or intentionally; three, obtained personal identifying information of another person without the authorization of that person; and four, used or attempted to use that information

Equal Protection clause of the federal constitution applies to give the defendant the benefit of the lesser sentence. And, in this case, that is the identity fraud sentence.

This argument is substantiated by an analysis of the Equal Protection clause. Under the clause, laws must be written so that those who are similarly situated are treated alike. Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 2.11(a) (1986). In particular, criminal laws must be written so that people who engage in the same conduct cannot be charged and punished differently:

Equal protection of the law guarantees like treatment of all those who are similarly situated. Accordingly, the criminal laws must be written so that there are significant differences between offenses and so that the exact same conduct is not subject to different penalties depending upon which of two statutory sections a prosecutor chooses to charge.

State v. Fedorowicz, 2002 UT 67, ¶48, 52 P.3d 1194 (citation omitted).

This principle is soundly based. Different treatment of persons guilty of the same illegal actions have resulted in basic unfairness, and even chasmal social and economic divisions, for centuries. Alfred A. Slocum, Reasonableness Through the Eye of

with fraudulent intent, including to obtain or attempt to obtain good services or any other thing of value; five, and the value of the goods, services or any other thing of value is less than \$300.

R. 64 [107-08].

Although worded differently, there is no material difference in these instructions. Certainly, the identity fraud instructions mentioned obtaining personal information of another, while the forgery instructions did not. However, the forgery instructions require the use of Mr. Batley's personal information in making, completing, executing, authenticating, issuing, transferring, publishing, or uttering a writing purporting to be that of Mr. Batley. And so, obtaining another's personal information is necessarily assumed in the forgery elements, and there is no difference between the instructions.

Invisibility: Ralph Ellison's Novel Invisible Man, 2 Rutgers Race & L. Rev 1, 29-31

(2000). And the problem has not disappeared. In fact, some statutory schemes still unwittingly allow for more severe charges against immigrants,¹⁰ racial minorities,¹¹ the poor,¹² or those who have expressed unpopular opinions.¹³ Disparate treatment may also result merely from the momentary inclinations or vagaries of the prosecutor. Fedorowicz, 2002 UT 67, ¶48. The Equal Protection provision is necessary to diffuse such circumstances and ensure that persons situated alike are treated alike. Moore v. Missouri, 159 U.S. 673, 678 (1895).

In Utah, this principle is expounded in the Shondel jurisprudence. In State v. Shondel the Utah Supreme Court remanded a case for re-sentencing because the defendant had been sentenced under the most severe of two statutes proscribing the possession of LSD. State v. Shondel, 453 P.2d 146, 148 (Utah 1969). In explaining its holding, the Court started with the principle that, under the Equal Protection clause, the criminal laws must affect alike people situated alike. Id. at 147. Accordingly, statutes

¹⁰ Catherine E. Halliday, Inheriting the Storied Pomp of Ancient Lands: An Analysis of the Application of Federal Immigration Law on the United States' Northern and Southern Borders, 36 Val. U.L. Rev. 181, 207-210 (2001).

¹¹ Stephanie J. Kim, Sentencing & Cultural Differences: Banishment of the American Indian Robbers, 29 J. Marshall L. Rev. 239, 253-55 (1995).

¹² See Bearden v. Georgia, 461 U.S. 660, 670-73 (1983) (discussing the appropriateness of various equal protection tests where the defendant claims to have failed to pay fines on the basis of poverty).

¹³ Tracy L. Coghill, Wisconsin v. Mitchell: The Debate Between Hate Crime Statutes and Freedom of Speech Continues, 45 Mercer L.R. 1475, 1475-76 (1994).

should be clearly written so that an average person may understand what conduct is prohibited and how the conduct is punished. Id. at 148. Because of this, when there is uncertainty about which of two punishments is applicable, the accused is entitled to the lesser:

The well-established rule is that a statute creating a crime should be sufficiently certain that persons of ordinary intelligence who desire to obey the law may know how to conduct themselves in conformity with it. A fair and logical concomitant of that rule is that such a penal statute should be similarly clear, specific and understandable as to the penalty imposed for its violation.

Related to the doctrine just stated is the rule that where there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser.

Id.

Since Shondel, this holding has been applied to moderate potential inequities in the criminal justice system. For instance, the Utah Supreme Court has applied it to require the re-sentencing of defendants convicted of theft by deception rather than selling an imitation controlled substance,¹⁴ aggravated sexual assault rather than rape,¹⁵ and uttering a forged prescription rather than obtaining a medicine by forgery. State v. Fair, 456 P.2d 168, 169 (Utah 1969).

Of course, some limitations apply to the Shondel doctrine. The most important is that the two statutes at issue must proscribe exactly the same conduct. State v. Gomez,

¹⁴ State v. Hill, 688 P.2d 450, 452 (Utah 1984).

¹⁵ State v. Loveless, 581 P.2d 575, 577 (Utah 1978).

722 P.2d 747, 749 (Utah 1986). In other words, the elements of the crimes must be the same. State v. Fisher, 972 P.2d 90, 99 (Utah 1998). If the elements are different, it is constitutional for the defendant to be charged with the crime carrying the most severe sentence. State v. Crick, 675 P.2d 527, 532 (Utah 1983). Nonetheless, if there is doubt about which statute applies,¹⁶ or if the statutes create irrational or arbitrary classifications,¹⁷ the scheme is unconstitutional and the defendant is entitled to the lesser sentence. To allow the lesser in some cases and the greater in others would be to allow a form of “arbitrariness that is foreign to our system of law.” State v. Kent, 945 P.2d 145, 147 (Utah Ct. App. 1997).

In this case, the two statutes at issue are the forgery and identity fraud statutes. These statutes have the same elements, and they have no distinctions of consequence.¹⁸ Because of this, it is unclear which statute applies in this case, and so Mr. Valdez is entitled to the benefit of the lesser sentence available under the identity fraud statute.

¹⁶ State v. Kerekes, 622 P.2d 1161, 1167 (Utah 1980); Shondel, 453 P.2d at 148; State v. Perry, 871 P.2d 576, 579 n.3 (Utah Ct. App. 1994).

¹⁷ State v. Green, 2000 UT App 33, ¶6, 995 P.2d 1250; State v. Clark, 632 P.2d 841, 844 (Utah 1981).

¹⁸ There is only one possible difference between the statutes. That is, forgery involves the impersonation of either a real or unreal person, Utah Code Ann. § 76-6-501(1)(b) (1999), and identity fraud could involve only the impersonation of a real person. Utah Code Ann. § 76-6-1102(2)(a) (Supp. 2002).

However, it is not clear that the identity fraud statute punishes only those who impersonate real people. And there is, as yet, no interpretive case law. Furthermore, this does not affect the fact that these crimes have the same basic elements, and are identical in practical application. Finally, in this case, the person allegedly impersonated was a real person. So, any distinction on the basis of whether the person was real is immaterial here.

The similarity of the statutes is shown by a comparison of the statutes. First, forgery is committed when a person:

- 1) alters any writing, utters any altered writing, makes, completes, executes, authenticates, issues, transfers, publishes, or utters any writing;
- 2) which purports to be the act of another person, either existent or nonexistent;
- 3) and is not the act of that person or authorized by that person;
- 4) and the defendant knows that it is not the act of that person or authorized by that person;
- 5) and the defendant had a purpose to defraud or knowledge that he was facilitating a fraud.¹⁹

These elements are the same as those of identity fraud. A person commits identification fraud when he:

- 1) uses or attempts to use;
- 2) another person's personal identifying information, including his name, address, telephone number, driver's license number, Social Security number, place of employment, employee identification numbers, mother's maiden name, or other information that can be used to access another's personal financial, medical, or other information;
- 3) and the use is not authorized by that person;
- 4) and the user uses the information knowingly or intentionally;

¹⁹ R. 64 [105]; Utah Code Ann. § 76-6-501(1) (1999).

5) and with fraudulent intent, including to obtain or attempt to obtain, credit, goods, services, medical information, or any other thing of value.²⁰

This basic comparison alone shows that the statutes have similar elements. But the similarity is even more apparent with a close examination of the plain language of the statutes.²¹

The action element of forgery, which is altering any writing, uttering any altered writing, or making completing, executing, authenticating, issuing, transferring, publishing, or uttering any writing, is the same as the identity fraud element of using or attempting to use the personal identifying information of another. Both elements refer to the impersonation of another person, and both are remarkably broad. Indeed, the identity fraud statute's use of the term "use" easily covers any act of impersonation covered by the forgery statute.²² The very meaning of "use" is to employ,²³ and it is difficult to imagine any act that this would not cover in the context of fraud.

This demonstrates the fallacy of the trial court's reasoning in denying the defense

²⁰ R. 64 [107-08]; Utah Code Ann. § 76-6-1102 (1) & (2) (Supp. 2002).

²¹ See State v. Bluff, 2002 UT 66, ¶34, 52 P.3d 1210 ("The primary rule of statutory interpretation is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve. To discover that intent, we look first to the plain language of the statute. In construing a statute, we assume that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.").

²² See Utah Code Ann. § 76-6-1102 (2)(b) (Supp. 2002) ("A person is guilty of identity fraud when that person knowingly or intentionally: . . . uses, or attempts to use, that information . . .")

²³ Merriam Webster's Collegiate Dictionary, 1301 (10th ed. 1997).

counsel's motion to instruct the jury on identity fraud. The trial court denied the motion on the basis that forgery is committed when the actor utters a writing, while identity fraud is not. The court said:

I think there's testimony that Mr. Valdez is the individual that wrote the check and received the goods and services, and I think the difference between identity fraud and forgery is the writing part of it. Identity fraud does not include the utterance of a writing, and in this particular incident we have the uttering of a writing.

R. 64 [96].

However, the utterance of a writing does not distinguish identity fraud from forgery. This is because uttering a writing, or in other words, offering a forged instrument to another,²⁴ is using the information of another as proscribed by the identity fraud statute. Utah Code Ann. § 76-6-1102(2)(b) (Supp. 2002). The identity fraud term "use" is broad and covers every act covered by the forgery statute. Black's Law Dictionary defines "use" as "[t]he application or employment of something" Black's Law Dictionary 1540 (7th ed. 1999). Webster's Dictionary has a long list of general and special meanings, but defines the word generally as either "the act or practice of employing something" or "to put into action or service: avail oneself of: employ." Merriam Webster's Collegiate Dictionary 1301 (10th ed. 1997). Under these broad definitions any act enumerated by the forgery statute or by interpretive case law is included in the identity fraud statute.

As a matter of fact, the identity fraud statute's use of the broad term "use" prompts

²⁴ Charles E. Torcia, Wharton's Criminal Law, § 494 (15th ed. 1996) ("Uttering a forged instrument, an offense at common law, is the offering of a forged instrument to another, knowing it to be forged, with intent to defraud.") (footnotes omitted).

a review of the forgery action element to determine whether it is actually less inclusive than the identity fraud statute. However, a review shows that it is not. Like the action element of the identity fraud statute, the action element of the forgery statute is broadly stated, and it refers to any employment of another's personal information to commit fraud. This is apparent from the case law. The case law provides a long list of general and specific acts that constitute forgery.

For instance, forgery may be committed by writing, by typewriting, by printing, by pasting one name over another, or by engraving. Charles E. Torcia, Wharton's Criminal Law § 478 (15th ed. 1996). Further, as the Utah legislature has clarified, the term "writing" includes a variety of computer and technological uses, such as:

printing, electronic storage or transmission, or any other method of recording valuable information including forms such as: (a) checks, tokens, stamps, seals, credit cards, badges, trademarks, money, and any other symbols of value, right, privilege, or identification; (b) a security, revenue stamp, or any other instrument or writing issued by a government or any agency; or (c) a check, an issue of stocks, bonds, or any other instrument or writing representing an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise.

Utah Code Ann. § 76-6-501(2) (1999). What is more, the term "uttering" used in the forgery statute covers delivering a forged deed or lease, leaving it for recording, presenting a forged check for payment, delivering a forged consignment ticket, using a railroad ticket on which the destination has been erased and replaced with a different destination, suing on a forged note, offering a forged document in evidence, or using a forged instrument to make a gambling bet. Charles E. Torcia, Wharton's Criminal Law §

496 (15th ed. 1996). And this list is not even all-inclusive, it is merely exemplary. This shows that forgery is not less inclusive than identity fraud. The action elements in the two statutes are the same.

Finally, it is important to note that the action elements of both the forgery and identity fraud statutes clarify that neither crime requires the actual consummation of a theft or other appropriation. The statutes simply require that the actor use another's information with the intent to defraud. So, proof that the actor actually got away with something is unnecessary for either crime.

All in all, the action elements of both forgery and identity fraud refer to the same broad category of actions. They are not distinguishable, and as a practical matter, any act supporting the charge of forgery would support the charge of identity fraud, and any act supporting identity fraud would support forgery. Therefore, these elements are the same.

The second elements of forgery and identity fraud involve the actual information used in the criminal act. Under the forgery statute, the information is any information used to make a writing, execution, authentication, issuance, transference, publication, or utterance seem to be that of another. Utah Code Ann. § 76-6-501(1)(b) (1999). The identity fraud statute actually lists this information, and includes names, addresses, telephone numbers, driver's license numbers, Social Security numbers, places of employment, employee identification numbers, mother's maiden names, electronic identification numbers, digital signatures or private keys, or any other numbers or information that may be used to access a person's personal information. Utah Code Ann.

§ 76-6-1102 (1) (Supp. 2002).

These elements of the statutes are the same for two reasons. First, the information listed in the identity fraud statute could be used to perpetrate a forgery, and it would qualify as part of a forgery. The forgery statute shows this. Under the statute, the information used may be anything involved in the altering “any writing of another,” or anything used to make a writing, execution, authentication, issuance, transference, publication, or utterance seem to be that of another. Utah Code Ann. § 76-6-501(1) (1999). This is a broad category of information, and the statute specifically includes any information used in “printing, electronic storage or transmission, or any other method of recording valuable information” Utah Code Ann. § 76-6-501(2) (1999). It also includes the information available on any commercial instrument, including checks, tokens, stamps, seals, credit cards, badges, trademarks, money, securities, revenue stamps, stocks, and bonds. *Id.* And, of course, it further includes names, document drafts, and company agency. Charles E. Torcia, Wharton’s Criminal Law, § 478-80 (15th ed. 1996).

Second, the forgery statute is not broader than the identity fraud statute because the identity fraud statute has a catch-all provision that indicates identity fraud may be perpetrated through the use of:

any other numbers or information that can be used to access a person’s financial resources or medical information in the name of another person without the consent of that person except for numbers or information that can be prosecuted as financial transaction card offenses under Sections 75-5-506 through 76-6-506.4.

Utah Code Ann. § 76-6-1102(1)(k) (Supp. 2002). This covers any information that could be used to perpetuate a forgery. Therefore, the information elements of the forgery and identity fraud statutes are the same.

The third elements of the forgery and identity fraud statutes are the same on their face. Both elements require the prosecutor to show that the act was committed without authorization by the person whose information is used.²⁵ So, no further analysis of these elements is necessary.

The fourth elements give the mental elements required for the offenses. These elements are the same. A forgery is committed when a person acts “with knowledge that he is facilitating a fraud to be perpetrated by anyone.” Utah Code Ann. § 76-6-501 (1) (1999). And, identity fraud is committed when a person “knowingly or intentionally” uses the personal identifying information of another without the other’s consent. Utah Code Ann. § 76-6-1102(2) (Supp. 2002). These mental elements are indistinguishable. Both statutes require, as a minimum, knowingly acting. And the fact that the identity fraud statute mentions the mental state of “intentionally” acting, while the forgery statute does not, is inconsequential. This is because, if a mental state of “knowingly” acting is sufficient to support a crime, the higher mental state of “intentionally” acting will also support the crime.²⁶ And so, forgery and identity fraud cannot be distinguished on that

²⁵ Utah Code Ann. § 76-6-501(1) (1999); Utah Code Ann. § 76-6-1102(2)(a) (Supp. 2002).

²⁶ See Utah Code Ann. § 76-2-103(1) & (2) (1999) (showing that the “intentional” mental element is more exact than the “knowing” element). See also State v. McClain, 706 P.2d 603,

basis.

The fifth elements both involving acting with fraudulent intent. The forgery statute says that forgery is committed if the actor has a “purpose to defraud anyone, or [acts] with knowledge that he is facilitating a fraud to be perpetrated by anyone” Utah Code Ann. § 76-6-501(1) (1999). And the identity fraud statute says that identity fraud is committed when another person’s identifying information is used “with fraudulent intent, including to obtain, or attempt to obtain, credit, goods, services, any other thing of value, or medical information in the name of another person without the consent of that person.” Utah Code Ann. § 76-6-1102(2)(b) (Supp. 2002).

There is no material difference between these elements. Acting with the purpose to defraud is the same as acting with fraudulent intent. Indeed, Black’s Law Dictionary defines “defraud” as causing “injury or loss to (a person) by deceit” and then refers the reader to the term “fraud,” which is the root word of “fraudulent” in “fraudulent intent.” Black’s Law Dictionary 434 (7th ed. 1999). Fraud is extensively defined in a number of contexts. However, the primary definition is “[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.” Id. at 670. There is no discernable difference between this and causing “injury or loss to (a person) by deceit.” These terms are merely different ways of saying the same thing. What

605 (Utah 1985) (explaining that forgery is committed where the actor had “knowledge of the fraud and intentional participation in the forgery.”) (citation omitted).

is more, the terms have been used interchangeably in Utah case law,²⁷ including forgery cases. State v. Andreason, 2001 UT App 395, ¶5-6, 38 P.3d 982. And, no distinction between the terms is made in treatise discussions. Charles E. Torcia, Wharton's Criminal Law, § 477 (15th ed. 1996). So, these elements in the forgery and identification fraud statutes are the same.

In sum, there is no difference between forgery and identity fraud. The elements are the same, and the statutes were enacted for the same purposes. That is, the forgery statute was enacted to combat the fraudulent use of important commercial symbols and to redress injuries that are beyond the amount of the theft. State v. Frampton, 737 P.2d 183, 195 n.59 (Utah 1987). And the identity fraud statute appears to have been enacted for the same reason.²⁸

Yet, these statutes assign different consequences for the same conduct. Forgery is

²⁷ State v. Stites, 297 P.2d 227, 229 (Utah 1956); State v. Aures, 127 P.2d 872, 873 (Utah 1942).

²⁸ See Steven A. Hetcher, Norm Proselytizers Create a Privacy Entitlement in Cyberspace, 16 Berkeley Tech. L.J. 877, 894 (2001) (explaining that the root concern of the “identity theft” crime is the growing practice of thieves who avail themselves of crucial personal information available online and use the information to go on shopping sprees at the expense of their victims); Richard L. Field, The Electronic Future of Cash, 46 Am. U.L. Rev. 967, 1005-06 (1997) (also referring to computer-accessible personal information and its role in the crime of identity fraud).

Apparently, the concern with the online theft of personal information spawned statutes such as Utah identity fraud statute. But this concern is merely an updated version of the same concern that underlies the much-older forgery statutes. Both statutes are meant to deter the fraudulent use of commercial symbols and thereby create confusion and ruin in our society. And, both statutes have the same elements. So, under Shondel, the confusion created by this should be allayed by the application of the statute with the lesser consequence.

a third-degree felony. Utah Code Ann. § 76-6-501 (3) (1999). Conversely, the seriousness of identity fraud depends upon the value of the thing taken or nearly taken. If the value is less than \$300, as it was in this case, identity fraud is a class B misdemeanor, and class B misdemeanor punishments apply.²⁹


Mr. Valdez is entitled to be sentenced for a class B misdemeanor under the identity fraud statute. Although his actions qualify as either identity fraud or forgery because the elements of these crimes are the same, under the Shondel jurisprudence he is entitled to the benefit of the lesser penalty. And that penalty is the class B misdemeanor penalty available under the identity fraud statute. So, his sentence under the forgery statute should be vacated, and this case should be remanded for re-sentencing.

CONCLUSION

In light of the above, Mr. Valdez's sentence for forgery should be vacated and this case should be remanded for re-sentencing under the identity fraud statute.

SUBMITTED this 30th day of December, 2002.

²⁹ Utah Code Ann. § 76-6-1102(3)(a) (Supp. 2002). Identity fraud is a class A misdemeanor if the value of something cannot be determined, or if the value is or exceeds \$300 but is less than \$1,000. Identity fraud is a third degree felony if the value is or exceeds \$1,000 but is less than \$5,000. Finally, identity fraud is a second degree felony if the value is or exceeds \$5,000. Utah Code Ann. § 76-6-1102(3) (Supp. 2002).


HEATHER JOHNSON
Attorney for Defendant/Appellant

JOHN O'CONNELL, JR.
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, HEATHER JOHNSON, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 30th day of December, 2002.


HEATHER JOHNSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of December, 2002.

ADDENDUM A

IMAGED

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
 :
 :
 :
vs. : Case No: 021901647 FS
 :
 :
ANTHONY JAMES VALDEZ, : Judge: DENNIS M. FUCHS
Defendant. : Date: September 30, 2002

PRESENT

Clerk: wendypg

Prosecutor: BERNARDS-GOODMAN, KATHERINE

Defendant

Defendant's Attorney(s): O'CONNELL, JOHN D JR

ENTERED IN REGISTRY
OF JUDGMENTS

DATE

10/07/02

DEFENDANT INFORMATION

Date of birth: May 13, 1974

Video

Tape Number: video Tape Count: 9:14

CHARGES

1. FORGERY - 3rd Degree Felony

Plea: Not Guilty - Disposition: 07/25/2002 Guilty

SENTENCE PRISON

Based on the defendant's conviction of FORGERY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Criminal Sentence @J



021901647 JD12109232 VALDEZ, ANTHONY JD

Case No: 021901647
Date: Sep 30, 2002

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Court orders this case to run concurrent with any others defendant is serving.

SENTENCE FINE

Charge # 1 Fine: \$5000.00
 Suspended: \$5000.00
 Surcharge: \$

 Total Fine: \$5000.00
 Total Suspended: \$5000.00
 Total Surcharge: \$0
Total Principal Due: \$0
 Plus Interest

SENTENCE TRUST


The defendant is to pay the following:
Restitution: Amount: \$278.71 Plus Interest
Pay in behalf of: VICTIM

Attorney Fees: Amount: \$250.00
Pay in behalf of: LDA

SENTENCE TRUST NOTE

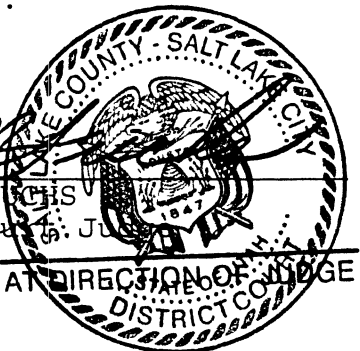
Trust to be supervised by the Board of Pardons.

Dated this 30 day of Sept, 2002.


DENNIS M. FUCHS
District Court, Ju

By

STAMP USED AT DIRECTION OF JUDGE



ADDENDUM B

474 (Utah Ct. App. 1991), cert. denied, 843 P.2d 516 (Utah 1992).

Cited in State v. Slowe, 728 P.2d 110 (Utah 1985); State v. Parkin, 742 P.2d 715 (Utah Ct. App. 1987); State v. Deitman, 739 P.2d 616

(Utah 1987); State v. Branch, 743 P.2d 1187 (Utah 1987); State v. Barber, 747 P.2d 436 (Utah Ct. App. 1987); State v. Hunter, 831 P.2d 1033 (Utah Ct. App. 1992); State v. Davis, 965 P.2d 525 (Utah Ct. App. 1998).

COLLATERAL REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d Larceny § 49.

C.J.S. — 52A C.J.S. Larceny § 60(1).

76-6-413. Release of fur-bearing animals — Penalty — Finding.

(1) In any case not amounting to a felony of the second degree, any person who intentionally and without permission of the owner releases any fur-bearing animal raised for commercial purposes is guilty of a felony of the third degree.

(2) The Legislature finds that the release of fur-bearing animals raised for commercial purposes subjects the animals to unnecessary suffering through deprivation of food and shelter and compromises their genetic integrity, thereby permanently depriving the owner of substantial value.

History: C. 1953, 76-6-413, enacted by L. 1997, ch. 119, § 2.

came effective on May 5, 1997, pursuant to Utah Const., Art. VI, Sec. 25.

Effective Dates. — Laws 1997, ch. 119 be-

PART 5

FRAUD

76-6-501. Forgery — “Writing” defined.

(1) A person is guilty of forgery if, with purpose to defraud anyone, or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he:

(a) alters any writing of another without his authority or utters any such altered writing; or

(b) makes, completes, executes, authenticates, issues, transfers, publishes, or utters any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication or utterance purports to be the act of another, whether the person is existent or nonexistent, or purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed.

(2) As used in this section, “writing” includes printing, electronic storage or transmission, or any other method of recording valuable information including forms such as:

(a) checks, tokens, stamps, seals, credit cards, badges, trademarks, money, and any other symbols of value, right, privilege, or identification;

(b) a security, revenue stamp, or any other instrument or writing issued by a government or any agency; or

- (c) a check, an issue of stocks, bonds, or any other instrument or writing representing an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise.
- (3) Forgery is a felony of the third degree.

History: C. 1953, 76-6-501, enacted by L. 1973, ch. 196, § 76-6-501; 1974, ch. 32, § 19; 1975, ch. 52, § 1; 1995, ch. 291, § 15; 1996, ch. 205, § 27.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, incorporated former Subsection (3), which had set out the elements of second degree forgery, into Subsection (2); deleted “with a face amount of \$100 or more” after “a check” in Subsection (2)(c); de-

leted “if the writing is or purports to be a check with a face amount of less than \$100; all other forgery is a class A misdemeanor” from the end of Subsection (3); and made minor stylistic changes throughout the section.

The 1996 amendment, effective April 29, 1996, in Subsection (2) added “electronic storage or transmission” and substituted “valuable information including forms such as” for “information,” making related stylistic changes.

NOTES TO DECISIONS

ANALYSIS

Attempt.
 Attorney signing client's name.
Authority to use forged signature.
 Computer crimes distinguished.
 Defenses.
 — Insanity.
 — Postdated check.
 Elements of offense.
 — Making and passing.
 — Passing.
 — Signature.
 Evidence.
 — Handwriting.
 — Other crimes.
 — Sufficient.
 False pretenses distinguished.
 Fictitious name.
 Indictment or information.
 — Variance.
 Intent.
 Lesser included offense.
 “Make” or “utter.”
 Prescription.
 Sentencing.
 Signature.
 — In general.
 — Authority to sign another's name.
 Standard of proof.
 Theft consolidation rule.
 Uttering.
 Verdict.
 Cited.

Attempt.

Where information charging offense of forgery contained one count for forgery and another for uttering, attempt to utter could be shown, for it was immaterial that attempt to utter was unsuccessful; it was fact of uttering or attempting to utter that was of evidentiary value. *State v. Green*, 89 Utah 437, 57 P.2d 750 (1936).

The crime of attempted forgery involves the same culpability and dishonesty as does the crime of forgery itself. *State v. Ross*, 782 P.2d 529 (Utah Ct. App. 1989).

Attorney signing client's name.

Section 78-51-32, which authorizes an attorney to execute documents in the name of a client, does not authorize an attorney to forge a client's name to a negotiable instrument such as a settlement check and does not preclude the attorney's conviction for forgery as a matter of law when he does so; however, when an attorney acts pursuant to the general authority granted by § 78-51-32 he may not later be convicted of forgery. *State v. Musselman*, 667 P.2d 1061 (Utah 1983).

Authority to use forged signature.

Where defendant forged his accomplice's name on checks which accomplice owned but had reported stolen, then cashed the checks and split the proceeds with the accomplice, defendant committed forgery as defined under Subsection (1)(b), notwithstanding that the accomplice authorized defendant to sign his name. *State v. Collins*, 597 P.2d 1317 (Utah 1979).

Computer crimes distinguished.

The elements of the computer crimes statute, § 76-6-703, are distinct from those of this section, insurance fraud, § 76-6-521, and communications fraud, § 76-10-1801, and, thus, it was within the prosecutor's discretion to charge and the trial court's authority to sentence defendant for computer crimes, rather than the crimes carrying lesser penalties. *State v. Kent*, 945 P.2d 145 (Utah Ct. App. 1997).

Defenses.

— Insanity.

Insanity, if sufficiently established, would

ADDENDUM C

PART 10**MAIL BOX DAMAGE AND MAIL THEFT****76-6-1002. Damage to mail receptacle — Penalties
Greater offenses.**

- (1) A person commits the crime of damage to a mail receptacle if the person knowingly damages the condition of a mail receptacle, including:
- (a) taking, concealing, damaging, or destroying a key; or
 - (b) breaking open, tearing down, taking, damaging, or destroying a mail receptacle.
- (2) (a) In determining the degree of an offense committed under Subsection (1), the penalty levels in Subsection 76-6-106(3)(b) apply.
- (b) If the act committed amounts to an offense subject to a greater penalty, this subsection does not prohibit prosecution and sentencing for the more serious offense.

History: C. 1953, 76-6-1002, enacted by L. 1998, ch. 87, § 2; 2002, ch. 166, § 7.

Amendment, effective May 6, 2002, updated the statutory reference in Subsection (2)(a).

Amendment Notes. — The 2002 amendment

PART 11**IDENTITY FRAUD ACT****76-6-1101. Identity fraud.**

This part is known as the “Identity Fraud Act.”

History: C. 1953, 76-6-1101, enacted by L. 2000, ch. 57, § 4.

Amendment, effective on May 1, 2000, pursuant to Utah Const., Art. VI, Sec. 25.

Effective Dates. — Laws 2000, ch. 57 became

76-6-1102. Identity fraud crime.

- (1) For purposes of this part, “personal identifying information” may include:
- (a) name;
 - (b) address;
 - (c) telephone number;
 - (d) driver’s license number;
 - (e) Social Security number;
 - (f) place of employment;
 - (g) employee identification numbers or other personal identification numbers;
 - (h) mother’s maiden name;
 - (i) electronic identification numbers;
 - (j) digital signatures or a private key; or
 - (k) any other numbers or information that can be used to access a person’s financial resources or medical information in the name of another person without the consent of that person except for numbers or information that can be prosecuted as financial transaction card offenses under Sections 76-6-506 through 76-6-506.4.

(2) A person is guilty of identity fraud when that person knowingly or intentionally:

(a) obtains personal identifying information of another person without the authorization of that person; and

(b) uses, or attempts to use, that information with fraudulent intent, including to obtain, or attempt to obtain, credit, goods, services, any other thing of value, or medical information in the name of another person without the consent of that person.

(3) Identity fraud is:

(a) a class B misdemeanor if the value of the credit, goods, services, or any other thing of value is less than \$300;

(b) a class A misdemeanor if:

(i) a value cannot be determined and the personal identifying information has been used without the consent of that person to obtain medical information or to obtain employment; or

(ii) the value of the credit, goods, services, or any other thing of value is or exceeds \$300 but is less than \$1,000;

(c) a third degree felony if the value of the credit, goods, services, or any other thing of value is or exceeds \$1,000 but is less than \$5,000; or

(d) a second degree felony if the value of the credit, goods, services, or any other thing of value is or exceeds \$5,000.

(4) Multiple violations within a 90-day period may be aggregated into a single offense, and the degree of the offense is determined by the total value of all credit, goods, services, or any other thing of value used, or attempted to be used, through the multiple violations.

History: C. 1953, 76-6-1102, enacted by L. 2000, ch. 57, § 5; 2002, ch. 122, § 3.

Amendment Notes. — The 2002 amendment, effective May 6, 2002, added “or to obtain employment” in Subsection (3)(b)(i) and made a stylistic change.

Effective Dates. — Laws 2000, ch. 57 became effective on May 1, 2000, pursuant to Utah Const., Art. VI, Sec. 25.

76-6-1103. Investigation, jurisdiction, and prima facie evidence of violation.

(1) In any criminal proceeding brought pursuant to this section, the crime shall be considered to have been committed in any county in which any part of the identity fraud took place, regardless of whether the defendant was ever actually in that county.

(2) In addition to investigations conducted by law enforcement agencies, the Division of Consumer Protection also has responsibility for investigating violations of this part where identity fraud is the primary violation that is alleged to have been committed.

(3) A criminal conviction under this part is prima facie evidence of a violation of Section 13-11-4, of the Utah Consumer Sales Practices Act.

(4) Any violation of this part constitutes a violation of Section 13-11-4, of the Utah Consumer Sales Practices Act.

History: C. 1953, 76-6-1103, enacted by L. 2000, ch. 57, § 6; 2002, ch. 122, § 4.

Amendment Notes. — The 2002 amendment, effective May 6, 2002, in Subsection (2) added the beginning of the sentence ending with “agencies” and added the ending of the sentence beginning with “where identity fraud.”

Effective Dates. — Laws 2000, ch. 57 became effective on May 1, 2000, pursuant to Utah Const., Art. VI, Sec. 25.

Cross-References. — Division of Consumer Protection, Title 13, Chapter 2.